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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co.,

Respondents,

V.

Hull Storey Retail Group, LLC and Sumter Mall, LLC,

Appellants.

Appeal from Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009

PETITION FOR REHEARING

John S. Simmons [SC Bar # 10260]
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
Tel: (803) 779-4600

Patrick M. Killen [SC Bar#15531]
#1 Law Range, Suite B
Sumter, SC 29150
Tel: (803)774-5026

Attorneys for Respondents/Petitioners

Pursuant to Rules 221(a) and 240, SCACR, the Respondents Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co. (hereafter "Branco") respectfully move the Court for rehearing and/or to alter its opinion no. 2021-UP-009 of January 13, 2021, which reversed the trial court's order finding in favor of Branco on his claim for tortious interference with contract. Because the Court's opinion overlooks evidence in the record that supports the trial court's findings of fact and conclusions of law, Branco respectfully requests that the Court rehear this matter or alter its opinion to affirm the rulings of the trial court and uphold the judgment. See, e.g., *Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 777 S.E.2d 208 (2015) (reinstating the trial judge's decision where there was evidence in the record to support the findings of fact and the Court of Appeals ignored such findings and substituted its own, thereby exceeding its standard of review); See also *Bass v. SC DSS*, 414 S.C. 558, 780 S.E.2d 252 (2015) (finding that "the Court of Appeals acted outside its limited scope of review" when, "rather than examining the record to discern whether there was any evidence put forward to support the jury verdict, the Court of Appeals seems to have searched the record for evidence to corroborate [the Defendant's] theory of the case.")

I. The Court Overlooked Evidence Which Supports the Existence of A Contract

Despite the well-defined standard of review, the Court instead appears to have disregarded the existence of at least some evidence of a valid contract or, in the alternative, improperly weighed the evidence and decided which evidence (specifically, a contingency provision contained within the contract) was more important. In doing so, the Court's opinion conflicts with the relevant case law and deviates from the standard of review.

On appeal from a bench trial, "the trial judge's findings of fact will not be disturbed . . . if there is **any evidence** to reasonably support his findings." *Meredith v. Mt. Pleasant Boat Bldg. Co.*, 286 S.C. 115, 333 S.E.2d 565 (1985) (emphasis added). "The trial court's findings are equivalent to a jury's findings in a law action." *Hardaway Concrete v. Hall Contracting Corp.*, 647 S.E.2d 488, 374 S.C. 216 (S.C. App. 2007) (internal citations omitted). Thus, the Court's standard of review extends only to correction of errors of law. *Hunt v. Forestry Comm'n.*, 358 S.C. 564, 595 S.E.2d 468 (2003).

The Court's opinion further misapprehends the evidence in the record to support the trial court's judgment; rather than reviewing the record on appeal to determine whether the low bar of "any evidence" to support the ruling was found, the Court appears to have focused solely on a supposedly unmet contingency in the asset purchase agreement, rather than the existence of the asset purchase agreement itself. In short, the Court has overlooked evidence in the record that supports the trial court's finding that a contract - the March 1st asset purchase agreement - existed between Branco and BrookTenn.

Electing to focus on the "red herring" of the lease provision in the asset purchase agreement between Branco and BrookTenn – instead of on the evidence establishing the existence of the asset purchase agreement itself – the Court improperly weighed the evidence. As a result, the Court disregarded the "any evidence" standard and instead elected to ground its opinion on its view of the evidence; namely, that the asset purchase agreement executed by Branco and BrookTenn never existed because an alleged contingency contained therein was not met. This ignores the fact that a valid contract was formed on March 1, 2013, regardless of whether it contained a contingency, as evidenced by the signatures of both parties thereto and the conduct of all involved. R. p. 359. Further, by its plain meaning, the contract was in effect for at least 90 days from the date of execution. The Court appears to ignore at least some evidence that the contingency contained in the asset purchase agreement was, in fact, satisfied, at least as testified to by BrookTenn's representative at trial. R. pp. 154-155.

Finally, the Court ignores the fact that the existence and validity of the contract was acknowledged by the interfering parties - Appellants Hull Storey Retail Group, LLC and Sumter Mall, LLC (collectively "Hull-Storey") - through both their words and conduct, to wit: Hull-Storey, when it learned of the asset purchase agreement, made demand upon Branco and BrookTenn for a "lease assignment fee" in the amount of $70,000. If the asset purchase contract never existed, as this Court contends, then that necessarily begs the question – why would Hull-Storey assert it was owed additional monies as a result of the asset contract? R. pp. 155-157. Why would Hull-Storey contact BrookTenn and suggest it break its agreement with Branco? R. pp. 129 -131; p. 157; p.160; pp. 360-362; pp. 378-379.

"[W]hen the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant

and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached . . . A contract may arise from actual agreement of the parties manifested by words, oral or written, or by conduct." *Conner v. City of Forest Acres*, 611 S.E.2d 905, 363 S.C. 460 (S.C. 2005) (internal citations omitted); See also *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 303, 468 S.E.2d 292, 300 (1996) (contract may be based on verbal understanding to which both parties have mutually assented and upon which both are acting); *Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) ("agreement" does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement).

A. The Court's Reliance Upon *Chitwood v. McMillan* is Misplaced

The evidence in the case is that Branco decided not to renew its 10-year lease at the Sumter Mall and, instead, entered into an agreement to sell his assets to BrookTenn by way of a wholly separate asset purchase agreement, such contract containing certain performance requirements for BrookTenn. The Court's reliance upon *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939) is thus in error, as the facts presented in *Chitwood* are wholly distinct from those here.

In *Chitwood*, a contract was entered into between SCDOT and Mr. Bowe for work to include, but not limited to, the removal of homes and structures from the right of way. Mr. Bowe subsequently entered into a subcontract with Chitwood to perform the removal work only and notified the SCDOT of same. SCDOT thereafter notified Mr. Bowe that it would not authorize Chitwood to work on the project and sent a letter advising of same. Chitwood thereafter brought suit against SCDOT, asserting a claim for intentional interference with his subcontract.

The Supreme Court, in affirming the trial court's granting of a nonsuit in favor of SCDOT, found that Mr. Bowe was forbidden, pursuant to the terms of his contract with SCDOT, from entering into any subcontract without first obtaining written consent from SCDOT (which he failed to do). Here, the expiring Lease Agreement contains no such prohibition against Branco entering into a contract to sell his business (as well there would not be, as no business owner would agree to have their landlord dictate when or if the assets of his business could be sold) and the Asset Purchase Agreement was separate and distinct from the lease agreement. Accordingly, the Court's reliance upon *Chitwood* is wholly inapposite, as *Chitwood* involved an underlying contract that

contained express terms forbidding subcontracts without prior approval. Here, there was no subcontract, nor did the mall's lease contain any prohibition against the sale of a privately held business.

Hull-Storey's sole involvement in the asset purchase transaction could have only occurred if Branco elected to try to assign or sublet the lease.[1] With no evidence in the record of any attempt to assign and/or sublet the existing lease - and at least some evidence in the record that BrookTenn had an asset purchase contract with Branco and had separately entered into an agreement for a lease with Hull-Storey, the Court of Appeals substituted its view of the evidence for that of the trial court in finding that the asset purchase contract was essentially rendered void for failure of Brooke Tenn to obtain a lease. See, e.g., *Collins Entertainment Corp. v. Coats, et al.*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (affirming trial court's finding that there was sufficient evidence of the existence of a contract even though the signatory differed, and further, the actions of the relevant parties served to ratify the contract).

For all of these reasons, the Court should grant this Petition for Rehearing and reconsider its decision overturning the findings of the trial court.

II. The Court Addressed an Issue that the Trial Court did not Address

The Court should reconsider its decision because it addressed an issue that the trial court did not address – namely, that because there was no written lease agreement entered into between BrookTenn and Hull-Storey, allegedly in violation of the Statute of Frauds, the underlying asset

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[1] In fact, the record reflects that this case is not – and never was - about the enforcement of the assignment and subletting provision contained in section 16.1 of the Lease. R. p. 330. There is no evidence in the record that Branco elected to exercise his rights to assign or sublet under the Lease Agreement; indeed, Hull-Storey acknowledged as much in its briefing, admitting that Hull-Storey's demand for a lump sum payment was the result of its legitimate – but mistaken – view of a contractual right to a lease assignment payment, based upon its "perception" that the asset purchase agreement was an "end run" to attempt to avoid having to pay a lease assignment payment. App. Br. at p. 17. BrookTenn's representative testified that he was never getting an assignment. R. p. 88. In fact, his testimony was that the first he heard of the assignment provision was when he received an email on April 30, 2013 from Hull-Storey. R. p. 90; R. pp. 366-372. It was for the trial court to weigh and consider the credibility of this testimony. See, e.g., *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) ("Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal.")

purchase agreement was a nullity. Because the trial record is devoid of any argument as to the Statute of Frauds – and Hull-Storey raised this argument for the first time in its post-trial motion for reconsideration – the Court should decline to consider this argument.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (internal citations omitted). In this case, the trial court never ruled on the merits of the statute of frauds defense and this Court should refrain from doing so on appeal. See, e.g., *Semken v. Semken*, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008) (declining to address an additional sustaining ground because "it would be unfair to [Respondents] because this argument was not presented to the [lower]court", [t]he parties never mentioned or discussed" the argument made for the first time on appeal, and the court "may ignore any such arguments"); See also *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005) (declining to review an additional sustaining ground where "the issue was not argued to the trial court").

Conclusion

This Opinion fails to address the entire record before the Court and deviates from the applicable standard of review. By disregarding evidence in the record that supports the trial court's findings of fact and rulings of law, the Court of Appeals erred in reversing the judgment of the trial court. By solely focusing on the alleged contingency provision in the asset purchase agreement – instead of on the existence of the asset purchase agreement itself - the Court failed to acknowledge the existence of at least *some* evidence of a valid contract. Accordingly, Petitioners respectfully request that this Court grant this Petition and, upon further review, withdraw its opinion; address all the evidence in the record; and affirm the trial court's judgment in this matter.

-Signature Page to Follow-

John S. Simmons [SC Bar #10260]
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
Tel: (803) 779-4600

s/Patrick M. Killen (w/permission)

Patrick M. Killen [SC Bar#15531]
#1 Law Range, Suite B
Sumter, SC 29150
Tel: (803)774-5026

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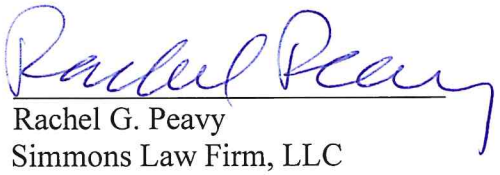
PROOF OF SERVICE

The undersigned hereby certifies that on January 26, 2021, she served counsel for Appellants with a copy of the *Petition for Rehearing* via electronic mail to the following:

Miles E. Coleman
Timothy E. Madden
Miles.Coleman@nelsonmullins.com
Tim.Madden@nelsonmullins.com
Nelson Mullins Riley & Scarborough
PO Box 10084
Greenville, SC 29603



Rachel G. Peavy
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
Tel: (803) 779-4600